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SUPREME COURT OF THE UNITED STATES

October Term, 1958

LAMAR BATH HOUSE COMPANY, BUCKSTAFF BATH HOUSE COMPANY, OZARK BATH HOUSE COMPANY, QUAPAW BATH HOUSE COMPANY, MAURICE BATH COMPANY, SUPERIOR BATH HOUSE COMPANY, FORDYCE BATH HOUSE AND HALE BATH HOUSE ..... *Appellants*

v. No. 791

CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, AND C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, AND ATTORNEY GENERAL OF THE STATE OF ARKANSAS ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

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INDEX

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 3

STATEMENT 5

HOW THE FEDERAL QUESTIONS ARE PRESENTED 11

THE QUESTIONS ARE SUBSTANTIAL 13

Conclusion 22

APPENDIX A—Decrees and Opinion Below A-1

1. Trial Court Decree A-1
2. Decree of Supreme Court of Arkansas A-5
3. Opinion A-6
4. Decree in Previous Litigation A-13

APPENDIX B—Ordinances, Statutes, Agreement and Constitutional Provisions Involved A-16

1. City Ordinance 2444 ..... A-16
2. City Ordinance 2449 ..... A-18
3. Arkansas Sewer Statute A-20
4. Agreement A-26
5. Cession by Arkansas to United States A-28
6. Acceptance of Cession by United States A-29
7. Federal Statutes Governing Hot Springs National Park A-29
8. Constitutional Provisions A-32

AUTHORITIES CITED

CASES

Appleby v. New York, 271 U. S. 364 ..... 2, 20

Arlington Hotel Company v. Fant, 278 U. S. 439 14

Atkinson v. Pine Bluff, 190 Ark. 65 21

Benson v. United States, 146 U. S. 325 14

Borough of Milltown v. City of New Brunswick, 3 N. J. Super. 113 22

Buckstaff Bath House Company v. McKinley, 308 U. S. 358 15

City of Cleveland v. Village of Cuyahoga Heights, 81 Ohio App. 191 22

City of Des Moines v. City of West Des Moines, 239 Iowa 1 22

City of Tacoma v. Taxpayers of Tacoma, 357 U. S. 320 21

Delmas v. Merchants' Mutual Insurance Company, 81 U. S. 661 20

Fort Leavenworth Railroad Company v. Lowe, 114 U. S. 525 2, 13, 15

Gelpcke v. City of Dubuque 68 U. S. 175 21

Hartford Steam Boiler Inspection & Insurance Company v. Harrison, 301 U. S. 459 2, 19

Hoeper v. Tax Commission of Wisconsin, 284 U. S. 206 2, 18

Hot Springs Cases, 92 U. S. 698 5

Hunt v. United States, 278 U. S. 96 16

Jernigan v. Harris, 187 Ark. 705 17

John P. King Mfg. Co. v. City Council of Augusta, 277 U. S. 100 2, 20

Johnson v. Russell, Mayor, 198 Ark. 42 22

Kern-Limerick, Inc. v. Scurlock, 347 U. S. 110 17

Ladwig v. Nance, 223 Ark. 559 15

M'Culloch v. Maryland, 4 Wheat (U. S.) 316 17

McElvey v. United States, 260 U. S. 353 16

McGehee v. Mathis, 71 U. S. 143 20

Morey v. Doud, 354 U. S. 457 19

Municipal Investors' Assoc. v. City of Birmingham, 316 U. S. 153 22

Myles Salt Company v. Board of Commissioners of Iberia & St. Mary Drainage District, 239 U. S. 478 2, 18

Pacific Coast Dairy, Inc. v. Department of Agriculture of California, 318 U. S. 285 2, 14, 16

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389 2, 19

Senior v. Braden, 295 U. S. 422 2, 18

State ex. rel. Gordon v. Taylor, 149 Ohio St. 427 22

Surplus Trading Company v. Cook, 281 U. S. 647 2, 14

United States v. Bennett, 232 U. S. 299 18

United States v. County of Allegheny, 322 U. S. 174 2, 14, 17, 20, 22

Utah Power & Light Company v. United States, 243 U. S. 389 2, 16

Van Brocklin v. Tennessee (Van Brocklin v. Anderson) 117 U. S. 151 17

Western Union Telegraph Company v. Chiles, 214 U. S. 274 14, 17

Wheeling Steel Corporation v. Fox, 298 U. S. 193 18

CONSTITUTION OF THE UNITED STATES

Article 1, Section 8, Clause 17 3, 4, 11, 13, A-32

Article 1, Section 10, Clause 1 3, 5, 20, A-32

Article 4, Section 3, Clause 2 3, 4, 13, A-32

Article 6, Clause 2 3, A-32

Amendment 14, Section 1 3, 17, 19, A-32

FEDERAL STATUTES

28 USC § 1257 (2) 2

28 USC § 1257 (3) 2

28 USC § 2103 2

Act of Apr. 20, 1832, 4 Stat. 505 5

Act of Dec. 16, 1878, c. 5, 20 Stat. 258, as amended by Act of Apr. 12, 1904, c. 1249, 33 Stat. 173; 16 USC § 361 3, 5, 15, A-29

Act of Mar. 3, 1891, c. 533, 26 Stat. 842; 16 USC § 362, 363 3, 5, 9, 15, 18, A-30

Act of April 20, 1904, c. 1400, 33 Stat. 187; 16 USC § 372 3, 5, 15, A-29

Act of Aug. 25, 1916, c. 408, 33, 39 Stat. 535 5

Act of Mar. 4, 1921, c. 161, 41 Stat. 1407 3

Act of Aug. 8, 1953, c. 384, 67 Stat. 495, 16 USC § 1b 16

STATE STATUTES

2 Ark. Stats. § 19-2301 21

2 Ark. Stats § 19-2313 21

2 Ark. Stats. § 10-1123 (Act 30, of Feb. 21, 1903) 3, 5, A-28

3 Ark. Stats. § 22-404 2

3 Ark. Stats. § 34-2501 et seq. 2, 6

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CITY OF HOT SPRINGS, ARKANSAS, HOT SPRINGS SEWER COMMITTEE, RAY S. SMITH, SR., THOMAS W. STONE, AND C. T. BATES, MEMBERS OF THE HOT SPRINGS SEWER COMMITTEE, AND ATTORNEY GENERAL OF THE STATE OF ARKANSAS ..... *Appellees*

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

JURISDICTIONAL STATEMENT

This appeal is taken from the decree of the Supreme Court of Arkansas entered June 16, 1958, affirming in part and reversing in part a decree of the Chancery Court of Garland County, Arkansas, holding a State statute and two City ordinances valid and applicable in respect to Hot Springs National Park, without repugnance to Federal law, and appellants submit this jurisdictional statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The decree of the Chancery Court, setting forth its grounds for decision, is not officially reported but is appended hereto at A-1. The opinion of the Supreme Court of Arkansas has not yet been officially reported but is appended hereto at A-6 and is reported in 315 S. W. (2d) 884.

JURISDICTION

1. This action was brought in the Chancery Court for an injunction against and declaratory judgment of invalidity and inapplicability of the State statute and two ordinances of the City of Hot Springs, Arkansas, at issue here. The proceeding was instituted pursuant to Vol. 3 Arkansas Statutes 1947 Annotated (Official Edition), Sections 22-404 and 34-2501 *et seq.* (Act 166 of 1903 and Act 274 of 1953 of Arkansas, as amended.)

2. The decree of the Supreme Court of Arkansas was entered on June 16, 1958 (T. 144) and is appended hereto at A-5. The order of the Supreme Court of Arkansas denying rehearing to appellants was entered on September 29, 1958 (T. 151). Notice of appeal to the Supreme Court of the United States was filed in the Supreme Court of Arkansas on December 27, 1958 (T. 152). On timely application, the time for docketing the appeal was enlarged to and including March 25, 1959 (T. 164).

3. The jurisdiction of this Court by appeal is conferred by 28 U. S. C. § 1257 (2) and by *certiorari* by 28 U. S. C. § 2103 and § 1257 (3).

4. Cases sustaining jurisdiction to review the decree below are: (a) *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U. S. 285; *Fort Leavenworth Railroad Company* v. *Lowe*, 114 U. S. 525; *Surplus Trading Company* v. *Cook*, 281 U. S. 647; *Utah Power & Light Company* v. *United States*, 243 U. S. 389; *United States* v. *County of Allegheny*, 322 U. S. 174; (b) *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206; *Myles Salt Company* v. *Board of Commissioners of Iberia & St. Mary Drainage District*, 239 U. S. 478; *Senior* v. *Braden*, 295 U. S. 422; (c) *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389; *Hartford Steam Boiler Inspection & Insur-*

ance Company v. *Harrison*, 301 U. S. 459; (d) *Appleby* v. *New York*, 271 U. S. 364; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100.

5. The validity of the following statute of the State of Arkansas and ordinances of the City of Hot Springs, Arkansas, enacted pursuant to the statute, is involved: Act 132 of the General Assembly of Arkansas of the year 1933 (Vol. 2 Arkansas Statutes 1947 Annotated, Official Ed., § 19-4101 through 19-4122), and Ordinances 2444 and 2449 of the City of Hot Springs, Arkansas. Their pertinent text is set forth in Appendix B, beginning, respectively, at pages A-20, A-16, and A-18. The pertinent text of the following Federal statutes, constitutional provisions, and agreement (entered into by the Department of the Interior, National Park Service) relating to Hot Springs National Park,[1] and the statute of the State of Arkansas ceding to the United States exclusive jurisdiction over the portion of the Park involved here, is also set forth in that Appendix, beginning at the page shown below for each:

(a). Acts of Congress: Act of December 16, 1878, c. 5, 20 Stat. 258, as amended, particularly by Act of April 12, 1904, c. 1249, 33 Stat. 173; 16 U. S. C. § 361 (A-29); Act of March 3, 1891, c. 533, 26 Stat. 842 *et seq.*, 16 U. S. C. §§ 362, 363 (A-30); Act of April 20, 1904, c. 1400, 33 Stat. 187, 16 U. S. C. § 372 (A-29);

(b). Cession by Arkansas to the United States: Act 30 of the year 1903, adopted February 21, 1903, Vol. 2 Arkansas Statutes 1947 Annotated (Official Ed.) § 10-1123 (A-28);

(c). Agreement of National Park Service and City of Hot Springs (A-26);

(d). Constitution of the United States: Article 1, Section 8, clause 17 (A-32); Article 4, Section 3, clause 2 (A-32); Article 6, clause 2 (A-32); Article 1, Section 10 (A-32); and Amendment 14, Section 1 (A-32).

QUESTIONS PRESENTED

The State and City sewer laws in issue have been applied here to impose the sewer charges in issue upon Ap-

[1] The area referred to in many statutes as the "reservation" is now known as Hot Springs National Park, by Act of Mar. 4, 1921, c. 161, 41 Stat. 1407. It will be called the "Park" herein.

pellants (lessees of Federally owned bath house premises of Hot Springs National Park) for sewage discharge of the Park, and have been held valid, as applied, by the Supreme Court of Arkansas in connection with which the following questions are presented:

1. Whether the local laws, as applied, unlawfully conflict with and violate: (a) the exclusive and paramount Federal authority and jurisdiction over this Park, over Appellants and over the subject matter of the local laws, as here applied, under Article 1, § 8, clause 17 and Article 4, § 3, clause 2 of the Federal Constitution, under applicable implementing Federal legislation, policy and practice governing the Park and subject matter of the local laws, and (b) Federal immunity, as to property and functions, from such impositions under that Constitution;

2. (a) If the charges can be imposed at all in respect to Park sewage, whether the local laws are applied here arbitrarily and unlawfully in imposing the charges in issue as a personal liability of Appellants, in violation of the due process clause of Section 1 of the 14th Amendment to the Federal Constitution, where the charges constitute charges against land, the "fee title," and are for sewage discharge of the Park attributable to the United States, rather than these lessees, respecting which the United States has sole responsibility, obligation, control and authority; and (b) is due process violated by the imposition outside the jurisdiction of the City and within that of another government;

3. If the charges can be imposed at all in respect to Park sewage discharge, whether the local laws, as applied here, effect an unconstitutional discrimination against Appellants, violating the equal protection clause of Section 1 of the 14th Amendment to the Federal Constitution, arbitrarily and unlawfully singling out and imposing the charges on Appellants while not imposing them on the other persons and institutions in like circumstances respecting Park sewage discharge and the subject matter and application of the local laws, and rather than imposing them on the land and owner, the United States, on which rests sole authority, responsibility, control and obligation respecting the Park sewage and the subject matter;

4. Whether the local laws, as applied to impose the sewer charges here, unlawfully abrogate a contract between the Federal Government and the City of Hot Springs, Arkansas, precluding the impositions, in violation of Article 1, § 10, Clause 1 of the Federal Constitution prohibiting impairment of contract obligations.

STATEMENT

In the year 1818, the United States acquired the property of Hot Springs National Park,[2] formerly known as the "Reservation," geographically situated in what is now Garland County, Arkansas. Congress subsequently enacted various statutes governing the area, reserving the land and hot springs for future disposal of Congress, forbidding entry, location and appropriation for any other purpose,[3] for example, and providing for granting leases of bath houses situated on the Park for "the public service" of hot water baths.[4] In 1903, the State of Arkansas ceded "exclusive jurisdiction" over the Park to the United States;[5] and in 1904, Congress accepted the cession and assumed "sole and exclusive jurisdiction"[6] over it. The Park and the City of Hot Springs, Arkansas, are situated adjacent to each other.

Appellants (one partnership, one individual and six corporations) are the eight operators of the eight public bath houses owned by the United States on the Park, occupying the premises under 20-year leases granted by the United States, Department of the Interior (T. 53-54, R. 63 *et seq.*).[7] The leases, of which Stipulated Exhibits 1 and 2 are typical,[8] were granted pursuant to federal statutes governing the Park, e. g. 26 Stat. 842, 16 U. S. C. §§ 362, 363, and 39 Stat. 535, 16 U. S. C. § 3. (Stip. ex.

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[2] See Hot Springs Cases, 92 U. S. 698.

[3] Act Apr. 20, 1832, 4 Stat. 505.

[4] Act Dec. 16, 1878, 20 Stat. 258; 16 U.S.C. § 361; Act Mar. 3, 1891, 26 Stat. 842, 16 U.S.C. § 362, 363.

[5] Act of Ark. Feb. 21, 1903, Act 30, 2 Ark. Stats. 1957 Annotated, § 10-1123.

[6] Act Apr. 20, 1904, 33 Stat. 187, 16 U.S.C. § 372.

[7] Reference to pages of certified transcript will be preceded by "T". and reference to the pages of the record as printed below will be preceded by "R."

[8] All stipulated exhibits are attached to transcript in a separate envelope. They were put in evidence by stipulations at T. 53 *et seq.* R. 49 *et seq.* and T. 64 R. 104.

1, p. 1), "for the purpose of providing bathing facilities for the public." (Stip. ex. 1, p. 1). The appellees, called the "City" in this statement, are the City of Hot Springs, Arkansas, its Sewer Committee and Members thereof. The Attorney General of Arkansas is a nominal party merely, (by 3 Ark. Stats. § 34-2510), having taken no part in the proceedings.

The City has applied its regulatory sewer ordinances and sewer charges provided therein, exercising its "police powers" (T. 135, A-6 *et seq. infra*), to the national Park and the portion of the sewage discharge of the Park which the City attributes to appellants, as their personal liability and responsibility, although the Federal Government discharges all sewage from all parts of the Park into its own sewer main located on the Park (T. 88, R. 117). This appeal is concerned in part with the regulatory, legislative power of the Federal Government and of the City, respectively, over the Park and disposal of sewage of the Park, which is owned and operated by the United States and is under its "sole and exclusive" legislative and territorial jurisdiction and sovereignty (T. 54, R. 51), and in part with the effects of arrangements made by agreement between the Federal Government and the City in the 1930's for disposal of sewage from both the federal area and the municipal area.

With respect to sewage disposal of the Park, the Federal Government, through the National Park Service, in the administration of the Park, has always had the policy, responsibility and obligation to provide for sewage disposal for the entire Park. (Stip. ex. 11, p. 30-32, 34-35, 39, R. 90-96).[9] The Federal Government pays the "total costs" for all sewage sources on the Park, including that of appellants (Id. p. 32, R. 91). "The sewage from the bath houses is a part of the Government sewage" (Id. p. 35, R. 93). "Every bit of sewage that arises on the Hot Springs Reservation, or Hot Springs National Park, whichever term you want to use, is a United States Government obligation to dispose of. This agreement was entered into in order to carry on and fulfill our obligation.

[9] Stip. ex. 11 is the record in previous litigation between the City and appellants, and the exhibit is stipulated in the present proceeding at T. 61 to constitute a part of the record here for all purposes.

It includes bath houses, among other things" (Id. p. 39, R. 95-96).

With respect to sewage disposal of the municipality, the City has this responsibility, to be fulfilled by exercise of its local "police powers." (Opinion below T. 135, appended hereto at A-6).

Prior to 1935, the Federal Government and the City used separate sewer facilities for their respective jurisdictions, the Federal Government's system for the Park consisting of lines leading to a sewer main built and owned by the Federal Government on the Park, carrying Park sewage away and discharging it into a creek (T. 87-88, R. 116-117, Stip. ex. 11, p. 31-32 R. 91, T. 94, R. 120).

In 1933 the two Governments, Federal and City, agreed to carry out a sewage disposal arrangement whereby sewer mains of each would be connected and used by both, though without transfer of ownership, and whereby new sewage disposal plants would be constructed, to be owned by the City but to be built by contributions from both Governments, the National Park Service contributing approximately $82,000.00, the City providing approximately $175,000.00 and other sources, e. q. Federal P. W. A., taking some part (T. 61, R. 61, St. ex. 11, p. 22, R. 85). Sewage from both the Park and the municipal area was to be carried to and treated at the new plants. The change, respecting Park sewage disposal brought about by the arrangement, was that the Park sewage, instead of being discharged into the creek, was picked up by the City at the end of the federal sewer main and carried by a City main out to one of the new disposal plants along with the City's own sewage from a part of the municipality which the Park Service permitted the City to drain through the federal sewer main on the Park, which main was already receiving all Park sewage and carrying it away as one discharge (Stip. ex. 11, p. 31-32, R. 91, T. 87-88, R. 116-117, T. 112, R. 130). A written agreement (appended hereto at A-26, T. 39, R. 38), signed by Federal and City authorities in 1935 on the subject, included the following terms:

> "That the Government be not charged for any service or use of the system at any time in the future.

"That the cost of all repairs, alterations, maintenance and operation of the system be borne by other than United States Government sources."

To provide its share of the funds for building the disposal plants in 1935, the City levied a sewer tax *ad valorem* on property, by ordinance. (Stip. ex. 11, p. 10, R. 83). It attempted to impose the tax ordinance upon appellants, who sued in the Chancery Court of Garland County, Arkansas, in the year 1935, to enjoin the City from enforcing it against them, alleging the exclusive jurisdiction of the United States over the Park and that the agreement between the National Park Service and the City prohibited the levy against them. (Stip. ex. 11, p. 1 *et seq.* R. 80 *et seq.*). In that previous suit, the City urged that appellants were not exempt by reason of their location on the Park and that the agreement did not cover them. (Id., p. 18-C, 19, R. 84). After full trial, in 1945, the court found "all issues" in favor of appellants and enforced the agreement between the two governments, holding that appellants were "United States Government sources" within the meaning of the agreement and could not be charged, enjoining the City from imposing the sewer tax ordinance upon them. (Id. p. 52, R. 103, appended hereto at A-13). The City did not appeal (T. 61, R. 62).

In 1953, the City found it necessary to enlarge and rehabilitate the disposal plants originally built in 1935 by contributions from both governments. The plants were overloaded and the work was found necessary "to give adequate service to the inhabitants of the City." (Ord. 2449, A-18, *infra*). The ordinances in issue here, No. 2444 and 2449, appended at A-16, A-18, were then enacted. The old sewer tax, which the Chancery Court, in the previous suit, had held not applicable to Park sewage sources is no longer levied by the City at all.

As in the instance of the old sewer tax ordinance, the City attempted to impose the new ordinances in issue here on account of sewage discharge from the Park which the City attributes to appellants.

The new ordinances and state statute in issue provide comprehensive regulatory powers to cities on the entire

subject of sewage disposal, the statute (A-20, *infra*) directing that sewer charges are to be paid by "each landowner" whose property is connected, (§ 19-4113), and that "it is the intention of this Act that a landowner shall be liable for such service charge, even though the use of the service system is by his tenant or lessee; . . . on such lands all charges, if not paid when due, shall constitute a lien upon the premises . . .; said charge to constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving the benefit of the service for which the rent or charge is due has merely a leasehold interest (or other lesser estate) in the premises." (§ 19-4113). Cities are given power to foreclose the liens in Chancery Court where the sewer system is located, power of eminent domain, jurisdiction for 10 miles outside their corporate limits for all purposes of the statute, the granted powers being cumulative to all other city powers. (§§ 19-4113, 19-4105, 19-4120). A sewer charge is levied based on volume of discharge into the sewer system, by Ordinance 2444, which also provides a lien upon land for the charge, "even though" use of the system is by a tenant or lessee. (A-16, *infra*).

Ordinance 2449 (A-18, *infra*) makes it a misdemeanor for any owner to fail or refuse to connect his property with the city sewer system, (§ 14), directs all owners of property to connect to the system, (§ 13), provides that the sewer charges are for work done at the disposal plants and for operation and maintenance of the city sewer system (§ 3, 6) and that "charges shall constitute a lien upon the fee title to the land and permanent improvements, even though the occupant receiving benefit of the service has merely a leasehold interest, or other lesser estate in the premises." (§ 12).

Appellants brought this action to enjoin enforcement of the local laws and to have them declared invalid, as applied here.

Appellants have never paid anything to the City for sewer purposes. They pay rental, called "franchise fee" or "water rent," to the Federal Government pursuant to Federal statutes (e. q. Act Mar. 3, 1891, 26 Stat. 842) and their leases, covering their occupancy and operations.

Their rental is calculated on the basis of volume of hot mineral water used in operating the bath houses plus a fixed amount per tub for public bathing purposes, authorized by the Park service. (e. g., Stip. ex. 1, p. 5 and Stip. ex. 2, p. 2 of contract amendment of year 1951 attached to lease contract).

The Federal Government is sole owner of the land and permanent improvements occupied by appellants under their leases; (T. 54, R. 51 *et. seq.*, Stip. ex. 1 and 2, R. 63 *et seq.*) the sewer charges in issue "constitute" a lien on the land, under the terms of both State statute and City ordinances, as shown above; and the Federal Government has sole and exclusive legislative and territorial jurisdiction over the Park (T. 54, R. 51), and has affirmatively assumed sole responsibility and obligation for sewage disposal of the entire Park. (Stip. ex. 11, p. 30-32, 34-35, 39, R. 90-96).

The City has not sought to impose the ordinances and sewer charges on any other occupants of the Park or for any other part of the sewage discharge on the Park except that from the portion occupied by appellants, other occupied sources on the Park being the Federal Hospital, National Park Service offices, Comfort Stations and dwellings; when the ordinances were first enacted in 1953, the occupant of one dwelling was billed for one month, but on notification to the City that the dwelling was located on the Park the City cancelled the sewer charge and has not attempted to impose it on that occupant or any other occupant of the Park except these appellants since that time (T. 60, R. 59-60).

The combined sewer use arrangement between the Federal Government and the City, which commenced in 1935, is still continuing in fact in all respects except as to the attempt made in this proceeding by the City to enforce its laws and charges against Appellants; the City is still using the federal main for drainage of one end of the City (T. 88-90, 98, R. 117 *et seq.*, 122); the facilities built by funds of both governments in 1935, which are still in use at the plants, are today worth approximately $400,000.00 (T. 122, R. 136). The new work done at the plants in and since 1953 in extensively enlarging and rehabilitat-

ing them amounted to some $663,000.00 plus engineering fees and incidentals (T. 128-129, R. 141).

There is apparently no issue remaining over the meaning of the agreement which was made by the Park service and the City in that covers by its terms all occupants and sources of sewage on the Park including appellants and by its terms would prevent imposition of the charges in issue here (T. 66, R. 106).

No consent of Congress or any other Federal authority has been suggested in the proceeding for application of the local laws in issue against the Park, the sewage discharge in issue or any occupant of the Park.

By far the major part of the sewer discharge of the Park attributed to appellants here is made up of hot mineral water from the Park springs used for the public bathing purpose, a small portion being made up of the fresh water purchased from the City water supply system. (Stip. ex. 10, T. 59, R. 59, 78-79). Calculated on fresh water discharge only, in an illustrative 12-month period, (October, 1954-September, 1955), the sewer charges would amount to $965.40, whereas calculation based on both city water and hot mineral water from the Government springs for that period would amount to $7,002.00. (Stip. ex. 10, R. 79).

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The Federal issues presented were raised at the inception of the proceeding (Complaint, T. 1, R. 19), and decided in the decree of the Chancery Court, (T. 66, R. 105), which, e. g., expressly cites Article 1, Section 8, Clause 17 of the Federal Constitution, incorporates into the decree all Federal constitutional and statutory law cited in the complaint and expressly confirms the important stipulation at T. 53, R. 49. All issues were carried forward to the Supreme Court of Arkansas by the direct appeal taken there by appellants, on the entire record (T. 69-71, 78; R. 110-112), and by the cross-appeal of the City from the portion of the Chancellor's decree holding the ordinances not applicable to hot mineral water originating from the Park springs (T. 81, R. 112). They were decided by the decree

of the Supreme Court of Arkansas by its express affirmance, on the entire transcript, of the trial court decree on the direct appeal and by its reversing the trial court in respect to the hot mineral waters (T. 144). They were again presented in the petition for rehearing, which was denied (T. 145-151).

The Chancery Court decree held that with respect to fresh water obtained and originating from the City water supply system the ordinances and statute, as applied here, were valid and not repugnant to the Federal Constitution, laws and authority in issue, and that appellants and the sewage discharge on and from the Park, attributed to them, were not immune from their application, but that the ordinances did not apply to the hot mineral water originating from the Government springs on the Park.

The Supreme Court of Arkansas, one Justice dissenting (T. 144), affirmed the Chancery Court decree in all respects as to the fresh water discharge, on appellants' direct appeal, and extended the rulings in the Chancellor's decree to subject the hot mineral water from the Government springs to the ordinances and statute, reversing the Chancellor's decree on the City's cross-appeal, holding that the State statute and ordinances were valid as applied to exact charges from Appellants for Park sewer discharge attributed to them, both of fresh and hot mineral water, that they were not repugnant to the Federal statutes or Constitution, and that no immunity from their application existed. Mr. Justice McFaddin dissented.

In the opinion, the Court below, at T. 137, referred to the issues by listing the headings under which they had been argued in appellants' brief there (e. g., the issue of lack of legislative and territorial jurisdiction of the City and of the trial court to enforce the sewer legislation here, the issue of unconstitutional impairment of contract, etc.) and then devoted itself to the City's contention that the agreement between the Federal Government and the City was *ultra vires* of the municipality in purporting to bind itself not to exercise its "legislative and governmental functions" by means of its police powers, in the form of the new sewer ordinances 2444 and 2449 and to apply the ordinances and their charges to the sewage discharge attrib-

uted to appellants when the needs of the City for improvement of its sewer system arose, for the health and well-being of its inhabitants. At T. 141, the Arkansas court rejected the grounds urged by appellants with the statement that they did not constitute "valid" reasons why the sewer charges should not be imposed upon them.

THE QUESTIONS ARE SUBSTANTIAL

The Federal Government carries out its operation of the Park in large part by means of the lease or concession contracts with Appellants and controls all phases of their activities by rules and the lease provisions, treating and regarding them for this purpose as a "government activity." (Stip. ex. 11, p. 35, R. 93; and Stip. ex. 1, 2, 3 and 4, R. 63, 68, 70, 71).

By the ordinances in issue, enacted in 1953, the City has unlawfully converted one of their claimed effects, nullification of the express prohibition of the Federal Government against the City's levying sewer charges on Park sources of sewage, into affirmative legislative, regulatory power over the Park and the subject of its sewage disposal, contrary to Article 1, Section 8, Clause 17 and Article 4, Section 3, Clause 2 of the Federal Constitution. Even if the agreement, containing the express prohibition, (appended at A-26), had never been made between the Federal and City authorities, the new ordinances as applied here would be nullities, wholly without effect, where the Park is, by the supreme law of the land, Federal Constitution and statutes, under "sole and exclusive jurisdiction" of the United States and where "all needful rules and regulations" respecting it are to be made by the Federal Government, which has affirmatively retained control and responsibility of all Park sewage in itself (Stip. ex. 11, p. 35-39, R. 93-96). The decree below is in direct conflict with law which has always governed such areas as this Park and their administration and with the following decisions of this Court which establish that no form or variety of local legislation can constitutionally have any operative effect respecting such areas and their operation and which also sustain the jurisdiction of this Court to review the decision to the contrary: *Fort Leavenworth Railroad Company* v.

Lowe, 114 U. S. 525 (taxation); *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U. S. 285 (milk control measures); *Surplus Trading Company* v. *Cook*, 281 U. S. 647 (taxation); *Western Union Telegraph Company* v. *Chiles*, 214 U. S. 274 (civil penalties); *Benson* v. *United States*, 146 U. S. 325 (crimes); *Arlington Hotel Company* v. *Fant*, 278 U. S. 439 (civil liability); and *United States* v. *County of Allegheny*, 322 U. S. 174 (taxation).

Even if appellants, rather than the United States, were the owners of the property in the Park respecting which the sewer charges "constitute" a charge and lien "against the fee title" (2 Ark. Stats. § 19-4113, A-23 *infra*) the charge would be unlawful. *Surplus Trading Company* v. *Cook, supra.*

The *Fant* case, *supra*, involving this Park, held even a state statute governing mere civil liability for damages between a hotel and its guest to be wholly without effect, even when the subject had never been acted upon by Federal authority, either by statute, policy or practice. In its opinion, 278 U. S. 439, at 455, this Court said:

> ". . . It was certainly a wise prevision which with the consent of the State brought within exclusive national jurisdiction the hospital buildings and accessories and all the forty-four springs from which the healing waters came, in order to secure to the government their complete police protection, preservation and control. This justified acquisition of the springs and hospital for the exclusive jurisdiction of the United States under clause 17, section 8, article 1 of the Constitution. Nor is the constitutional basis for acquisition any less effective because the springs thus kept safely available for the Federal purpose do in the abundance of their flow also supply water sufficient to furnish aid to the indigent and to those of the public of the United States who are able to pay for hotel accommodation on the little park surrounding the hospital and the springs. *Benson* v. *United States*, 146 U. S. 325, 36 L. ed. 991, 13 Sup. Ct. Rep. 60 and *Williams* v. *Arlington Hotel Co.* (C. C. A. 8th) 22 F. (2d) 669."

All forms of state legislation are excluded from operation here, in the absence of consent of Congress, as in the in-

stance of the District of Columbia itself. In the *Lowe* case, *supra*, 114 U. S. 525, at 532, 537, frequently called the leading case on exclusiveness of federal power over such areas, the applicable principle is thus stated:

> "When the title is acquired by purchase by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the Constitution that Congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of Congress."
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> "These authorities are sufficient to support the proposition which follows naturally from the language of the Constitution, that no other legislative power than that of Congress can be exercised over lands within a state purchased by the United States with her consent for one of the purposes designated; and that such consent, under the Constitution, operates to exclude all other legislative authority."

The decree below conflicts with a recent decision by the same Arkansas Court involving the Park, *Ladwig* v. *Nance*, 223 Ark. 559, holding the City to be without governmental power to regulate or legislate upon the subject of the work of appellants' employees in the operation of their bath houses and that only the Secretary of the Interior can make "needful rules and regulations regarding the operation of bath houses in the Hot Springs National Park." No consent of Congress has been given here, in contrast to the circumstances in *Buckstaff Bath House Company* v. *McKinley*, 308 U. S. 358, and we believe that the ordinances in issue are in conflict with appended Federal statutes involved, 20 Stat. 258, 33 Stat. 173, 26 Stat. 842, *et seq.*, 33 Stat. 187, 16 U. S. C. §§ 361-363, 372, providing for Federal regulation only, with Federal policy and practice in administering this Park, which has kept in Federal power and control the whole subject of Park sewage disposal, retaining sole responsibility and obligation on the subject (Stip. ex. 11, p. 35, 39 R. 93, 95-96), and fixing the

water rent paid to the Federal Government by Appellants under their leases to cover all operations and privileges of occupancy, including sewage disposal (Id. and Stip. ex. 1 and 2, R. 63 *et seq.*, 68 *et seq.*). Federal policy and authority was recently confirmed or extended, as to all utilities and all properties in the National Park System: Act of August 8, 1953, c. 384, 67 Stat. 495.

The local laws in issue make mandatory requirements of property owners, impose civil and criminal penalties for failure to comply and the charges explicitly "constitute" a lien upon the fee title to land and permanent improvements, the ownership of which is in the United States. They unlawfully emasculate Federal power over the territory and subject matter. "As respects such Federal territory, Congress has the combined powers of a general and a state government." *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California*, 318 U. S. 385. If the ordinances apply as to the Park and its sewage discharge, as they are held to do by the decree below, apparently they would prevent the Federal Government from determining that it would use or provide its own separate sewer facilities again for sewage disposal of the Park, or, at least, would appear to subject occupants of the Park or Federal officials who made the determination to civil or criminal penalties. Long range plans for administering the Park and long term leases, fixing water rent, cannot be entered into with certainty of fulfillment, if the decree below stands, because it is the City Council, rather than the Federal Government, which would determine, at its will, sewer charges and regulations for the Park, creating liens and emasculating the federal power to fix reasonable water rents on a long term basis, contemplating that the rents cover all privileges, including sewage disposal, as a government responsibility (Stip. Ex. 11, P. 32, 35, R. 91, 93). The Federal property and its use, regulation and operation are unlawfully placed under state regulation and control, at the mercy of state and city legislation. *Utah Power & Light Company* v. *United States*, 243 U. S. 389; *Hunt* v. *United States*, 278 U. S. 96; *McElvey* v. *United States*, 260 U. S. 353.

The public importance of the issues is manifest. If requirements, charges and liabilities on any subject are to be

created respecting the Park, it is Congress, and not the city or state, which has power to make them, as stated in *Western Union Telegraph Company* v. *Chiles*, 214 U. S. 274 at 278-279:

> "It is of the highest public importance that the jurisdiction of the state should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress by the Constitution . . . If it is desirable that penalties should be inflicted for a default in the delivery of a telegram occurring within the jurisdiction of the United States, Congress only has the power to establish them."

The charges here are "charges against the real estate," the "fee title to the land and permanent improvements," *in rem*, both by unambiguous terms of statute and ordinances, (e. g. 2 Ark. Stats. § 19-4113 *infra* at A-23, Ord. 2444, at A-17, and Ord. 2449, at A-19), and by holding of the Supreme Court of Arkansas, *Jernigan* v. *Harris*, 187 Ark. 705. The United States is the owner here (T. 54, R. 51); the sewage disposal of the Park is its function and responsibility; and the charges contravene the constitutional immunity of Federal property and functions from such charges, even though collection here is sought from Appellants: *M'Culloch* v. *Maryland*, 4 Wheat. (U. S.) 316; *Van Brocklin* v. *Tennessee* (*Van Brocklin* v. *Anderson*) 117 U. S. 151; *Kern-Limerick* v. *Scurlock*, 347 U. S. 110; *United States* v. *County of Allegheny*, 322 U. S. 174.

2. In Allegheny, *supra*, it is suggested that jurisdiction of this Court, where enforcement of a state levy on property is sought, *in personam*, against one not the owner, or against private persons because the Federal Government, the owner, is immune, could have been based on a claim unlawful deprivation of due process of law under Section 1 of the 14th Amendment to the Federal Constitution. Here the charge is on the "fee title" to the land and permanent improvements (2 Ark. Stats. § 19-4113), the foundation, theory and purpose of the particular charges here being permanent benefit to the land served by a sewer system and ownership of the land. *Jernigan* v. *Harris*, 187 Ark. 705. And the subject of the charge and basis of

its measure here is sewage discharge of the National Park. Enforcement as a personal liability of appellants is arbitrary and discriminatory, an unconstitutional violation of due process, as is attributing to Appellants the sewage discharge itself and the benefits arising from the sewer system, when the Federal Government has in fact always had the discharge of the entire Park as solely its discharge, obligation and responsibility, no part of which the City can, contrary to the fact of Federal policy, practice, control and responsibility, reasonably allocate and attribute to Appellants. (Stip. ex. 11, p. 30-35, 39, R. 90-96). The imposition here is analogous to imposing and measuring a property tax or income tax on one person where the property or income in fact belongs or is solely attributable to another person, an arbitrary and discriminatory act violative of due process, *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206, or assessing land of one person for benefits allocatable and attributable only to lands of others. *Myles Salt Company* v. *Board of Commissioners of Iberia & St. Mary Drainage District*, 239 U. S. 478. It is unconstitutionally arbitrary here for the added reason that the Federal jurisdiction over the Park is complete, separate from that of the City and state, as in the instance of two adjacent states; where the jurisdiction of one ends that of the other begins. Here Appellants are subject to regulation and charges by the government of the area in which they operate, for sewage disposal and all other benefits, in the form Congress chose to provide by statute, water rents (26 Stat. 842 *et seq.*, 16 U. S. C. §§ 362, 363). It should be as "impossible" here without violating due process, for the City to lay the charge outside the borders of its jurisdiction and within the borders of the jurisdiction of another government both as to territory and subject matter, as this Court holds it to be in instances where one state lays a tax on property located in another state. *United States* v. *Bennett*, 232 U. S. 299; *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193; *Senior* v. *Braden*, 295 U. S. 422. The decree below held that the ordinances and their charges, so applied and enforced, did not conflict with the due process clause, and the decisions above sustain the jurisdiction of this Court to review the decree's conclusion on that question.

3. The enforcement against these eight tenants of the Park, is unreasonably discriminatory both in placing burdens on tenants which can reasonably be placed, if at all, only on the owner of the land who is also the actual user of the sewer system under express federal policy, and in arbitrarily and deliberately singling out these eight Appellants (one partnership, six corporations and one individual, T. 53, R. 49) for the impositions among all of the individuals and institutions occupying and operating premises on the Park in like circumstances with respect to sewage discharge (T. 60, R. 59). The incident which occurred respecting the one instance when a charge was imposed on another individual occupant but quickly cancelled when the City was informed that the premises he occupied were located on the Park, pointedly emphasizes the existence and degree of arbitrary discrimination against Appellants (T. 60, R. 59-60). No other attempt is being made or has been made since enactment of the ordinances in 1953 to impose the ordinances and charges on any other occupant of the Park, though the sewage discharge of all goes into the same federal main, carried away as one discharge to the same disposal plant. The City has remained silent on the subject of discrimination; there is no explanation in the record for it, and we believe no reasonable basis for the discrimination can be conceived. There is no difference between appellants and all other individuals and institutions on the Park having any material or substantial relation to the subject matter and purposes of the ordinances, and arbitrarily charging Appellants for benefits which the City itself claims accrue to all, while excepting from charges all others in like circumstances, is unconstitutional discrimination, denial of equal protection of the laws in violation of Section 1 of the 14th Amendment to the Federal Constitution. *Morey* v. *Doud*, 354 U. S. 457; *Hartford Steam Boiler Inspection & Insurance Company* v. *Harrison*, 301 U. S. 459; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389. Those decisions also sustain this Court's jurisdiction of the appeal; Appellants invoked the clause in resisting the local laws, in the event the ordinances could be applied at all to Park sewage sources (T. 7, 8, R. 28, 29), and the decision below sustained their validity as applied.

4. The effect of the local legislation in overriding the long range agreement (appended at A-26) for combined use of sewer facilities by the Federal Government for its area and by the City unlawfully impairs the obligation of the agreement, which forbids the very charges in issue, contrary to Article 1, Section 10 of the Federal Constitution. The agreement is one by which the Federal Government exercised its constitutional functions in administering the Park, and its validity, construction and effects are questions controlled by Federal law, on which the state is not the final judge. In *United States* v. *County of Allegheny*, 322 U. S. 174, at 183, this Court said:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, the consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." (Citing applicable cases.)

Even apart from Federal law prohibiting the City from applying its laws to the Park with or without the additional force of the agreement, Appellants have reasonably claimed that the agreement is enforceable and may not, consistently with the Federal Constitution, be impaired by the local laws (T. 6, R. 25). This Court has jurisdiction to review the decree below holding that the agreement was not unlawfully impaired by the impositions and that the City had no power to make the agreement. (See T. 67-68, R. 107, T. 144, 138). *Appleby* v. *New York*, 271 U. S. 364; *John P. King Manufacturing Co.* v. *City Council of Augusta*, 277 U. S. 100, at 114-115. Contracts between the United States and a state cannot constitutionally be impaired, *McGehee* v. *Mathis*, 71 U. S. 143; and the rule that this Court, when the Federal claim is made, must ultimately determine the existence and validity of a contract and whether it is impaired is one of necessity, as stated in *Delmas* v. *Merchants' Mutual Insurance Company*, 81 U. S. 661:

> "Besides, this Court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by state legisla-

tion, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the state courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional state legislation."

We respectfully submit that the analysis made by the Court below of the Federal-City agreement read into it effects which are not there (A-5, A-26). It is not "perpetual" in purport; it merely had no time limit because neither jurisdiction is bound to use the sewer system for any length of time; also such physical facilities have a long life, which cannot be precisely fixed, and the time of operation of the agreement was necessarily indefinite by reason of the subject matter. The City was not bound to operate the system for any period of time or to make any repair or alteration except by its own unilateral determination, and the Federal Government can only request betterment of maintenance and operation, not enforce it. The same agreement had been held valid and enforced in previous litigation between the same parties in which that question was determined by final judicial decision (T. 45, Stip. ex. 11, at p. 53, R. 103, appended at A-13).[10] See *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320. The United States and Appellants entered into their current long-term leases, and fixed the rental on the reasonable assumption that City charges were not leviable on Park sewage. Until the decree below was rendered, long range sewer system contracts, between City and the Federal Government, of indefinite duration, embodying terms required by the Federal Government for it to be willing to cooperate and participate, were held valid by the Supreme Court of Arkansas. *Atkinson* v. *Pine Bluff*, 190 Ark. 65, and municipal contracts, made under general powers (e. g. 2 Ark. Stats. 1947 Anno., §§ 19-2313, 19-2301), were enforceable in the ab-

[10] If the rule stated in *Gelpcke* v. *City of Dubuque*, 68 U. S. 175, is to be applied rarely, still the circumstances here ought to warrant its application: "'The sound and true rule is, that if the contract, when made, was valid by the laws of the State as then expounded by all departments of the government, and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent action of legislation, or decision if its courts altering the construction of the law.' *Ohio Life & Trust Co.* v. *Debolt*, 16 How., 432."

sence of fraud and bad faith or arbitrary action. *Johnson* v. *Russell, Mayor*, 198 Ark. 49. The Ohio decision applied by the Arkansas Supreme Court, in its opinion below, to the Federal-City agreement here, *State ex rel. Gordon* v. *Taylor*, 149 Ohio St. 427, 79 N. E. 2d 127, has no application. In that case, the area involved was within the regulatory, legislative power of the City, in contrast to the circumstances here, and other distinctions have been noted by the New Jersey Court in *Borough of Milltown* v. *City of New Brunswick*, 3 N. J. Super. 113, 65 A. 2d 621, which rejected the Ohio decision.[11] And, in all events, the present action involves a long range agreement entered into by the Federal Government as a long range solution of an important aspect of its administration of a national park, pursuant to Federal statutes, and the validity and effects are for this Court to determine ultimately, both because of its subject matter and parties and because Appellants assert that the ordinances in issue have unlawfully impaired a valid agreement. *United States* v. *County of Allegheny, supra; Municipal Investors Association* v. *City of Birmingham*, 316 U. S. 153, at 157. The City has appropriated the benefits for over 20 years and continues to do so daily; it is still operating by the agreement except for rejecting the burdens of the agreement on the first occasion on which the burdens substantially affected it (without any suggestion in the record that it would suffer any financial or other distress in abiding by the agreement fully), the first and only major repair and alteration made since the Federal Government and City built the plants in 1935 (T. 57, R. 56). Whether a city can obtain such benefit as it has received here from the Federal Government by agreement and then nullify the burdens, at will, as to aspects of it which have become distasteful to the City, while continuing to appropriate the benefits, should be determined by this Court.

It is submitted that the local laws as applied conflict with the Constitution and laws of the United States and

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[11] Ohio itself upholds and enforces such agreements where two governmental jurisdictions make them, even two municipalities, *City of Cleveland* v. *Village of Cuyohoga Heights*, 81 Ohio App. 191, 75 N.E. 2d 99, as do all other decisions under circumstances which we believe analogous to those here, without any exception we have found: e.g. *City of Des Moines* v. *City of West Des Moines*, 239 Iowa 1, 30 N.W. 2d 500.

that the issues are so substantial and important as to require plenary consideration, with briefs and oral arguments, for their resolution.

Respectfully submitted,

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